90-1891

No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1990

LUCYLE KALISH and SOL JOSEPH KAMEN,

Petitioners,

– against –

FRANKLIN ADVISERS, INC., FRANKLIN DISTRIBUTORS, INC., FRANKLIN ADMINISTRATIVE SERVICES, INC., FRANKLIN RESOURCES, INC., FRANKLIN CUSTODIAN FUNDS, INC. (U.S. GOVERNMENT SECURITIES SERIES),

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is there a right to jury trial in a shareholder action for money damages under the Investment Company Act?

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OPINIONS BELOW

By a memorandum opinion and order dated February 29, 1988, [1987-88] Fed. Sec. L. Rep. (CCH) ¶ 93,649, the District Court for the Southern District of New York struck petitioners' demand for a jury trial. Mandamus was denied by the Court of Appeals for the Second Circuit on April 19, 1988. A6. On July 24, 1990 the District Court dismissed petitioners' claims and entered judgment in respondents' favor; the decision is reported at 742 F. Supp. 1222. Notice of appeal was filed and on November 27, 1990 the Court of Appeals rejected a suggestion for hearing in banc. A7-A10. On March 21, 1991 the Court of Appeals affirmed the District Court judgment. The opinion is reported at 928 F.2d 590.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was dated and filed on March 21, 1991. A1-A5. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

Due to their length, Sections 36(b) and 44 of the Investment Company Act of 1940, 15 U.S.C. Sections 80a-35(b) and 80a-43 are set forth in the appendix at A15 – A17.

STATEMENT OF THE CASE

Petitioners are shareholders of defendant Franklin Custodian Funds, Inc. (U.S. Government Securities Series) (the "Fund"), an open-end investment company or mutual fund registered under the Investment Company Act of 1940. They brought this action on behalf of the Fund against the investment adviser to the Fund and companies affiliated with the investment adviser. The action is brought under Section 36(b) of the Act to recover damages for excessive advisory fees. Section 36(b) expressly creates a fiduciary duty with respect to advisory compensation, and authorizes shareholders to bring actions for damages or other relief for breach of that duty.

On February 29, 1988, the District Court for the Southern District of New York struck petitioners' demand for a trial by jury; [1987-88] Fed. Sec. L. Rep. (CCH) ¶ 93,649. Mandamus was sought and denied without opinion. Thereafter the case was tried in November and December 1989. The District Court issued a lengthy decision dated July 24, 1990 dismissing petitioners' claims and entering judgment in respondents' favor; 742 F. Supp. 1222 (S.D.N.Y. 1990).

Petitioners appealed to the Court of Appeals for the Second Circuit and suggested hearing in banc based on this Court's decision in *Chauffeurs, Teamsters and Helpers,*

Local No. 391 v. Terry, 494 U.S. 558, 110 S.Ct. 1339 (1990). Petitioners suggested that the *Terry* case called into question earlier decisions of the Court of Appeals and other courts with respect to the right to a jury trial in cases brought pursuant to Section 36(b) of the Investment Company Act. Petitioners stated that in banc consideration was suggested by the need to secure uniformity with the respect to the right to a jury trial, a question of constitutional importance. A9. The Court of Appeals, without opinion, rejected the suggestion for hearing in banc. A9. On March 21, 1991 the Court of Appeals affirmed the judgment of the District Court for the reasons set forth in the District Court opinion, except as to the jury trial question. As to that question the Court of Appeals distinguished *Terry* on the ground that the issue in *Terry* involved "the breach of a collective bargaining agreement [which] is contractual and therefore is a legal issue." A4. The Court of Appeals held that the relief requested in the instant case "is clearly equitable in nature regardless of whether it is called damages." A5. As a result, said the Court, petitioners are not entitled to a jury trial.

REASONS FOR GRANTING THE WRIT

The Court of Appeals decision conflicts with applicable decisions of this Court and emasculates an important Act of Congress

This Court has long recognized that the right to trial by jury is a basic and fundamental element of constitutional philosophy. *Edmonson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, No. 89-7743 (June 3, 1991) (the jury system performs the critical functions of guarding the rights of

litigants and insuring continued acceptance of the laws by all of the people; slip. op. p. 20); *Simler v. Conner*, 372 U.S. 221, 222 (1963); *Bailey v. Central Vermont R. Inc.*, 319 U.S. 350, 354 (1943). Quoting from previous decisions, the Court in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 110 S.Ct. 1339, 1344-45 (1990), recently held:

> Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Both the Court of Appeals for the Seventh Circuit and the Court below acknowledged that the decision in *Terry* "appears to call into question the foundation" for prior opinions striking jury demands in cases brought under Section 36(b) of the Investment Company Act. *Kamen v. Kemper Financial Services, Inc.*, 908 F.2d 1338, 1351 (7th Cir.), *cert. denied on this point*, 111 S.Ct. 554 (1990); A3.

In *Terry* employees sued their union for breach of the duty of fair representation, seeking as relief the back pay which they had lost. The union argued that the action was analogous to an equitable suit by a trust beneficiary against a trustee for breach of fiduciary duty. This Court noted that the right to jury trial extends to causes of action created by Congress. 110 S.Ct. at 1344. The Court stated:

> To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. "First, we compare the statutory action to 18th-century actions brought in the courts of England

> prior to the merger of the courts of law and equity. *Second, we examine the remedy sought and determine whether it is legal or equitable in nature." Tull, supra,* 481 U.S. at 417-418, 107 S.Ct. at 1835-1836 (citations omitted). *The second inquiry is the more important in our analysis.*

110 S.Ct. at 1345 (emphasis supplied).

This Court held that the action was indeed analogous to an equitable suit by a trust beneficiary against a trustee for breach of fiduciary duty. Nevertheless, said the Court, quoting *Ross v. Bernhard,* 396 U.S. 531, 538 (1970), "The Seventh Amendment question depends on the nature of the *issue* to be tried rather than the character of the overall action." (110 S.Ct. at 1347; emphasis added by the Court in *Terry*). Quoting from *Curtis v. Loether,* 415 U.S. 189, 196 (1974), the Court noted that "an action for money damages was 'the traditional form of relief offered in the courts of law.'" (110 S.Ct. at 1347). The Court emphasized again the importance of the prayer for damages: "We have clearly held, however, that the second part of the inquiry – the nature of the relief – is more important to the Seventh Amendment determination." 110 S.Ct. at 1348 n.8. The Court upheld the right to a jury.

The Court below ignored the rationale of *Terry*. The Court of Appeals thought the result in *Terry* depended upon the fact that "the breach of a collective bargaining agreement is contractual and therefore is a legal issue." A4. It made scant mention of petitioners' demand for money damages, which, under *Terry*, is the key determinant of the right to a jury trial.

Section 36(b) of the Act authorizes a shareholder of an investment company to bring an action against an

investment adviser or any affiliated person of an investment adviser to recover "damages" or to seek "other relief" with respect to payments made to an investment adviser or affiliated person. The statute specifically authorizes an action for damages; no less than four times is the term used in Section 36(b).

Thus, under Section 36(b) a plaintiff shareholder may seek either damages on the one hand or, on the other hand, equitable relief, such as injunctive relief requiring the reduction of fees *in futuro*. The availability of alternative types of relief is confirmed by Section 44 of the Act.

Section 44, upon which jurisdiction of this action is based, confers jurisdiction upon federal district courts over "all suits in equity and actions at law brought to enforce any liability or duty created by" the Act. The Section thus draws the traditional distinction between a suit in equity and an action at law. With specific reference to Section 36(b), Section 44 goes on to provide "[t]he [Securities and Exchange] Commission may intervene as a party in any *action or suit* to enforce any liability or duty created by, or to enjoin any non-compliance with, section 36(b) of this title at any stage of such *action or suit* prior to final judgment therein." (Emphasis and interpolation supplied). Congress thus recognized in Section 44 that a shareholder's claim under Section 36(b) could be either a legal action (if it sought damages to enforce a liability or duty) or an equitable suit (if it sought equitable relief to enjoin non-compliance). In the present case damages – and only damages – are sought.

Moreover, under Section 36(b) excessive advisory fees are not determined solely by what the Fund pays.

Rather, the Court must look at all the facts in connection with the determination and receipt of advisory compensation, including so-called "fall-out" financial benefits received by the adviser; *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923, 930-932 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983). In the present case, for example, petitioners sought to show the extraordinary benefits flowing to the adviser by virtue of the exaction of a sales load on the reinvestment of dividends. Such benefits may serve to measure damages, but they are not items as to which restitution was, or could be, sought.

Even if the action be characterized as restitutionary, that would not deprive petitioners of their jury right. By the seventeenth century, the remedy of restitution was available both at common law and in equity. Although this form of relief was initially only available in equity, the common law judges eventually became jealous of the expanding power of the Court of Chancery. Conscious that the common law's inflexible and formalistic requirements in both pleading and proof afforded no remedy in many meritorious cases, these judges created the action of *indebitatus assumpsit* (also known as one of the "common counts" for an action for money had and received). *Stone v. White*, 301 U.S. 532, 534 (1937); *J.W. Carter Music Co. v. Bass*, 20 F.2d 390, 393 (S.D. Tex. 1927); *Restatement of Restitution*, Introductory Note, pp. 4-10 (1937); Prosser, *Handbook of the Law of Torts* (4th Ed.), § 94 at 627-31 (1971); James, *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655, 658-59 (1963).

It has been widely recognized that an action for money had and received is legal in form and is considered an action at law, although governed by equitable

principles. *Gaines v. Miller*, 111 U.S. 395, 397-98 (1884); *Herrmann v. Gleason*, 126 F.2d 936, 939 (6th Cir. 1942) ("This action, while legal in form, is equitable to the core."); *J.W. Carter Music Co. v. Bass, supra*, 20 F.2d at 393 ("Though an action at law, it is equitable in its nature, and is said to resemble a bill in equity, and to lie whenever a bill in equity would lie."); *Roberts v. Ely*, 113 N.Y. 128 (1889); *Byxbie v. Wood*, 24 N.Y. 607, 610-611 (1862); *Steinert v. Title Guarantee & Trust Co.*, 258 App. Div. 927, 16 N.Y.S.2d 749, 750 (2d Dept. 1939), *aff'd*, 283 N.Y. 636 (1940); 58 C.J.S., *Money Received*, § 1 at 906-07 (1948).

Because an action for money had and received, though governed by equitable principles, is universally recognized to be one at law, a jury trial has been historically available. Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 53, 57 (1888) (" . . . the right to a trial by jury was the principle reason for a creditor's preference for *Indebitatus Assumpsit* . . . "); 3 Blackstone Commentaries at 157-58; 58 C.J.S., *Money Received*, § 32 at 946. For examples of assumpsit cases for money had and received which were tried to a jury, *see Nash v. Towne*, 72 U.S. 689, 704 (1867); *Downey v. Hicks*, 14 How. 240, 246 (1852); *Brooks v. People's Bank*, 233 N.Y. 87, 93-94 (1922).

The wrongful denial of the jury right has served to emasculate an important Act of Congress. In 1970, Congress enacted Section 36(b) of the Investment Company Act. Its express purpose was to enable shareholders to utilize the courts to obtain redress with respect to advisory fees which investigation had shown to be excessive on an industry-wide basis. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 537 (1984). In the ensuing years, a number of

litigations were brought, many of which resulted in settlements producing reduced fees. However, in 1980 the Second Circuit in *In re Gartenberg*, 636 F.2d 16 (2d Cir. 1980), *cert. denied*, 451 U.S. 910 (1981), upheld the striking of a jury demand in a Section 36(b) case. Prior to that case no one appears to have questioned the right to a jury trial in an action brought for damages under Section 36(b).

Subsequent to *In re Gartenberg*, the number of settlements and the number of shareholder suits began to diminish. Six cases were brought to trial and in all six the judges, sitting without juries, ruled in favor of defendants.

This alone would not be remarkable except for the fact that in each of the six cases there were flagrant breaches of fiduciary duty, some of which were even yawningly acknowledged by the courts. For example, in the first case to go to trial, *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983), the Court of Appeals, after paying lengthy lip service to the statutory purposes, adopted a definition of the statutory standard which required "a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." 694 F.2d at 928. The Court found that even a pre-tax profit of $27 million on an advisory fee of $39 million "could hardly be labelled so excessive as to constitute a breach of fiduciary duty." 694 F.2d at 931 and n.4. The Court refused to find that the failure to disclose to the fund's trustees relevant cost information and potential benefits constituted a violation of Section 36(b), although it admonished the independent trustees of the

fund "in the interests of Fund investors, to initiate such studies." *Id.* at 933.

The second case to go to trial was inspired by the last quoted comments of the Court of Appeals. In *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 740 F.2d 190 (2d Cir. 1984), plaintiff sought to definitively establish the processing costs and benefits flowing to the adviser. The Court of Appeals found that the District Court was not clearly erroneous in discarding Merrill Lynch's own internal costs used in its certified audited financial statements, and found that no breach of fiduciary duty resulted from representation to the trustees that there was no positive float benefit to Merrill Lynch when, in fact, there was such a benefit. En route to its affirmance, the Court of Appeals scolded the District Court for ignoring voluntary float and free credit balances in its equation, but nevertheless affirmed the District Court's judgment that the fee was not so disproportionately large that it could not have been the product of arm's-length bargaining. 740 F.2d at 194.

In *Schuyt v. Rowe Price Prime Reserve Fund, Inc.*, 835 F.2d 45 (2d Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988), the Court of Appeals adopted the lower court's findings and conclusions by reference. The District Court there held that profitability percentages of 66.8%, 59.1% and 77.3% were not unduly high although it cautioned that its holding applied only because it was favorably impressed by the disinterested directors. 663 F. Supp. 962, 978-79, 989 n.77 (S.D.N.Y. 1987). In *Meyer v. Oppenheimer Management Corp.*, 715 F. Supp. 574, 576 (S.D.N.Y. 1989), *aff'd*, 895 F.2d 861 (2d Cir. 1990), the Court found that a 1900% return on equity was not disproportionate. And in *Krinsk v. Fund*

Asset Management, Inc., 875 F.2d 404, 409 (2d Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 281 (1989), the Court of Appeals upheld the finding of the District Court that the large fees of the adviser were justified by its excellent performance. The Court acknowledged that the petitioners had shown that the risk adjusted performance of the fund was far below average and also agreed that risk adjusted performance was the proper criterion for judging performance. However, said the Court, because the SEC had not decreed that risk adjusted performance must be used, the District Court was justified in excluding it from its consideration of whether or not Section 36(b) had been violated. 875 F.2d at 409.

In the present case, the Court refused to attribute any significance to the adviser's concealment of its own internal profitability study showing that nearly 99¢ out of every $1.00 of revenue was pure profit to the adviser. It also ignored huge economies of scale and down-played the blatantly improper shifting of advertising and promotion expenses into the advisory column, merely suggesting that the directors "keep these particular concerns in mind." 742 F. Supp. 1222, 1250. The Court "squarely rejected a Calvinistic condemnation of joy through profit." *Id.* at 1249. Once again, the Court of Appeals simply adopted the District Court opinion except for its discussion of the jury trial issue.

As a result of these cases, the institution of litigation under Section 36(b) has come to a virtual halt and many fund advisers have been reported to be seeking *increased* fees. *See Management Is Asking for a Raise*, New York Times, May 19, 1991, Section 3, p. 14; Fund Action, April 8, 1991, p. 3. The reduction of litigation is often thought

to be beneficial, and indeed it is. But not at the expense of determined judicial evisceration of an important congressional mandate for remedial regulation of financial institutions whose assets now exceed $1 trillion. Juries might have come to the same conclusion as the judges in the aforecited cases, although that is a conclusion at which one would arrive rather hesitatingly. The point is that the issues involved in the decided cases are not inherently equitable; and it is hardly imaginable that Congress, in enacting a statute providing for the recovery of damages, or the President, in putting his signature to that statute, ever imagined that they would be assigning the traditional function of juries to judges.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
June 10, 1991

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 829 August Term, 1990

(Argued January 29, 1991 Decided March 21, 1991)

Docket No. 90-7774

LUCYLE KALISH and SOL JOSEPH KAMEN,

Plaintiffs-Appellants,

v.

FRANKLIN ADVISERS, INC.; FRANKLIN DISTRIBUTORS, INC.; FRANKLIN ADMINISTRATIVE SERVICES, INC.; FRANKLIN RESOURCES, INC.; FRANKLIN CUSTODIAN FUNDS, INC. (U.S. GOVERNMENT SECURITIES SERIES),

Defendants-Appellees.

Before: TIMBERS, MESKILL and CARDAMONE, *Circuit Judges.*

Appeal from an order and a final judgment of the United States District Court for the Southern District of New York, Haight, *J.* Plaintiffs appeal from (1) the Memorandum Opinion and Order dated February 29, 1988 striking plaintiffs' jury demand, and (2) the final judgment dismissing plaintiffs' complaint, entered by the district court, reported at 742 F.Supp. 1222 (S.D.N.Y. 1990). In that final judgment the district court found that plaintiffs failed to prove management's breach of its fiduciary duty, the excessiveness of fees, the existence of economies of scale and the intentional misallocation of expenses.

Affirmed.

RICHARD M. MEYER, New York City (George A. Bauer III, Milberg Weiss Bershad Specthrie & Lerach, New York City, of counsel), *for Appellants.*

DANIEL A. POLLACK, New York City (Martin I. Kaminsky, W. Hans Kobelt, Pollack & Kaminsky, New York City, of counsel), *for Appellees Franklin Advisers, Inc., Franklin Distributors, Inc., Franklin Resources, Inc. and Franklin Administrative Services, Inc.*

BRIAN E. LORENZ, White Plains, NY, *for Appellee Franklin Custodian Funds, Inc. (U.S. Government — Securities Series).*

Per Curiam:

This is an appeal from an order and a final judgment of the United States District Court for the Southern District of New York, Haight, *J.* Plaintiffs appeal from (1) the Memorandum Opinion and Order dated February 29, 1988 striking plaintiffs' jury demand, and (2) the final judgment entered by the district court dismissing the complaint brought pursuant to section 36(b) of the Investment Company Act. 742 F.Supp. 1222 (S.D.N.Y. 1990). Plaintiffs claimed that Franklin Advisers breached its fiduciary duty by exacting an exorbitant fee. In its final judgment the district court found that plaintiffs failed to prove several necessary elements of their claim, including

management's breach of its fiduciary duty, the excessiveness of fees, the existence of economies of scale and the intentional misallocation of expenses.

We affirm the judgments of the district court. Judge Haight's decision striking plaintiffs' jury demand is explained in a separate unpublished memorandum from his final decision. In light of the recent Supreme Court decision, *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 110 S.Ct. 1339 (1990), we think a separate published opinion on the jury demand issue is in order.

Plaintiffs contend the district court erred in striking their jury demand. Plaintiffs claim that because they were seeking money damages only, *Terry* indicates that plaintiffs were entitled to a jury trial. A jury trial is not guaranteed to those seeking relief in equity. 5 *Moore's Federal Practice* ¶ 38.08 [5.-4], at 38-52 (1991). We have held that claims arising under section 36(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-35, for breach of fiduciary duty to recover excessive fees, are equitable in nature. *Krinsk v. Fund Asset Management, Inc.*, 875 F.2d 404, 414 (2d Cir.), *cert. denied*, 110 S.Ct. 281 (1989); *Schuyt v. Rowe Price Prime Reserve Fund, Inc.*, 835 F.2d 45, 46 (2d Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988); *In re Gartenberg*, 636 F.2d 16, 17-18 (2d Cir. 1980), *cert. denied*, 451 U.S. 910 (1981). Thus, a party seeking relief under section 36(b) ordinarily is not entitled to a jury trial. *Krinsk*, 875 F.2d at 414; *Schuyt*, 835 F.2d at 46; *Gartenberg*, 636 F.2d at 18.

A recent Supreme Court decision arguably has cast some doubt on these Second Circuit precedents. In *Terry*,

a dispute arising out of a union's refusal to refer plaintiffs' complaints to the grievance committee, plaintiffs sued their union for breach of the duty of fair representation. *Id.* at 1343. Plaintiffs sought relief from the union in the form of injunctive relief and compensatory damages for back pay and lost wages. The claim required proof that the employer breached the collective bargaining agreement and that the union breached the duty of fair representation. *Id.* at 1344. While the duty of fair representation, viewed alone, is equitable in nature, the breach of a collective bargaining agreement is contractual and therefore is a legal issue. *Id.* at 1347. The back pay sought was not money wrongfully held by the union; rather, it was money that would have been paid to the plaintiffs had their grievances been properly processed. This relief was not restitutionary in nature, nor was it incidental to a request for injunctive relief; the back pay sought constituted legal damages. *Id.* at 1348. As a result, the Supreme Court held that the Seventh Amendment entitled plaintiffs to a jury trial on all issues. *Id.* at 1349.

The Seventh Circuit has construed section 36(b) with respect to a plaintiff's jury demand in light of *Terry*. *See Kamen v. Kemper Financial Services, Inc.*, 908 F.2d 1338 (7th Cir.), *cert. granted in part on other grounds*, 111 S.Ct. 554, *cert. denied*, 111, S.Ct. 558 (1990). While the *Kamen* Court recognized that *Terry* may cast doubt on the foundation of earlier section 36(b) decisions, the *Kamen* Court held that section 36(b) relief was purely equitable, even under a *Terry* analysis. *See Kamen*, 908 F.2d at 1351.

The instant action presents a situation no different from that involved in *Krinsk, Schuyt, Garternberg* and *Kamen* and one plainly distinguishable from *Terry*. The

central issue in this action is whether the fund adviser violated its fiduciary duty to the fund by exacting an exorbitant fee. Any unreasonable portion of the fee must be returned to the fund. This restitutionary relief is clearly equitable in nature regardless of whether it is called damages. As a result, plaintiffs are not entitled to a jury trial.

Accordingly, the Memorandum Opinion and Order dated February 29, 1988 striking plaintiffs' jury demand is affirmed.

We have also considered plaintiffs' contentions arising out of the final judgment and find them to be without merit. As to these, we affirm substantially for the reasons set forth by Judge Haight in his Memorandum Opinion and Order. 742 F.Supp. 1222 (S.D.N.Y. 1990).

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

IN RE: LUCYLE KALISH
and SOL JOSEPH KAMEN,

Petitioners.

Docket Number:
88-3016

(Filed
April 19, 1988)

Before: Hon. Wilfred Feinberg, Chief Judge
Hon. Thomas J. Meskill, CJ
Hon. Lawrence W. Pierce, CJ

A petition for writ of mandamus and/or prohibition having been filed, Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED

Dated: April 19, 1988

Elaine B. Goldsmith, Clerk

BY: /s/ Edward J. Guardaro
Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KALISH V. FRANKLIN ADVISERS, INC. 90-7774
Docket Number
NOTICE OF SUGGESTION

state type of motion
for hearing in banc

Use short title
MOTION BY: *(Name, address and tel. no. of law firm and attorney in charge of case)*

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

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Has consent of opposing counsel:

A. been sought? [X] Yes [ ] No

B. been obtained? [ ] Yes [X] No

Has service been effected? [X] Yes [ ] No

Is oral argument desired? [ ] Yes [X] No

(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? [X] Yes [ ] No

B. by firm date of argument notice? [ ] Yes [X] No

C. If Yes, enter date: Week of December 17, 1990

Judge or agency whose order is being appealed:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [ ] Yes [ ] No

(*See F.R.A.P. Rule 8*)

Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

Brief statement of the relief requested: Appellant seeks hearing in banc under FRAP 35 on the grounds set forth on page 2 hereof.

Complete Page 2 of This Form

By: (*Signature of attorney*)

/s/ Richard M. Meyer
Signed name must be printed beneath
Richard M. Meyer

Appearing for: (*Name of party*)
Lucyle Kalish and
Sol Joseph Kamen
Date
10/29/90

Appellant or Petitioner:

[X] Plaintiff [ ] Defendant

Appellee or Respondent:

[ ] Plaintiff [ ] Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is denied. It is further noted that the motion for an original hearing of oral argument in banc has been transmitted to the judges of this court who are in regular active service, and that no such judge has requested a vote to be taken thereon.

FOR THE COURT:

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith, Clerk

FILED NOV 27 1990

Nov. 27, 1990

Previous requests for similar relief and disposition: None

Statement of the issue(s) presented by this suggestion: As set forth in Point IV of appellants' brief, *Local No. 391 v. Terry*, 110 S. Ct. 1339 (1990), requires reconsideration of this Court's prior decisions to secure uniformity with respect to the right to a jury trial under Section 36(b) of the Investment Company Act, 15 U.S.C. Section 80a-35(b). The proceeding involves a question of exceptional importance, namely the constitutional right to trial by jury.

Brief statement of the facts (*with page references to the moving papers*):

Reference is made to the Statement of Facts in appellants' brief.

Summary of the argument (*with page references to the moving papers*):

Reference is made to Point IV of appellants' brief.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUCYLE KALISH and SOL JOSEPH KAMEN,

Plaintiff,

-against-

FRANKLIN ADVISERS, INC., FRANKLIN DISTRIBUTORS, INC., FRANKLIN ADMINISTRATIVE SERVICES, INC., FRANKLIN RESOURCES, INC., and FRANKLIN CUSTODIAN FUNDS, INC. (U.S. GOVERNMENT SECURITIES SERIES),

Defendants.

Case No.
87 Civ. 6919 (CSH)

MEMORANDUM OPINION AND ORDER

(Filed
March 1, 1988)

HAIGHT, District Judge:

This action is now before the Court on defendants' motion to strike plaintiffs' demand for a jury trial.

Plaintiffs are shareholders of defendant Franklin Custodian Funds, Inc., (U.S. Government Securities Series) ("the Fund"). Plaintiffs bring their action pursuant to section 36(b) of the Investment Company Act of 1940 as amended, 15 U.S.C. §80a-35(b), for excessive compensation paid by the Fund to its investment adviser, Franklin Advisers, Inc., and other wholly-owned subsidiaries of defendant Franklin Resources, Inc. Plaintiffs seek relief "requiring the defendants other than the Fund to pay to

the Fund its damages." Complaint at 6. Since the complaint seeks only "damages," plaintiffs contend that their action is at law and that the Seventh Amendment entitles them to a jury trial. Defendants argue that the claim is equitable in nature and therefore triable to the court.

I.

The Seventh Amendment preserves the right to a jury trial only in suits "at common law," having no application to suits in equity. U.S.Const.Amend. VII. If at the time of the Seventh Amendment's enactment no right to a jury trial existed under the English common law as to a particular cause of action, then the Amendment does not guarantee the right to a jury trial in that suit. 5 Moore's Federal Practice ¶38.08(5) (1987). Where Congress creates statutory rights enforceable in a civil action, the Seventh Amendment protects the right to a jury trial "if the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis v. Loether,* 415 U.S. 189, 195, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260, 267 (1974).

II.

The Second Circuit has twice addressed the issue of whether a plaintiff in an action brought pursuant to section 36(b) of the Investment Company Act is entitled to a jury trial. *In re Gartenberg,* 636 F.2d 16 (2d Cir. 1980), *cert. denied,* 415 U.S. 910 (1981), the court denied a petition for mandamus to compel a jury trial. Petitioner's complaint asked that the investment adviser and its parent company be required "to account to the Trust for all excessive advisory fees paid to the Adviser by the Trust . . . and to

repay such fees to the Trust." *Id.* at 16. The court found that the complaint created an "equitable inquiry whether the Trust advisor violated its fiduciary obligations by charging an exorbitant fee." *Id.* at 18. Judge Van Graafeiland's opinion left open a section 36(b) plaintiff's right to jury trial if plaintiff made a "bona fide claim for damages," *Id.;* he did not undertake to define that term. Because petitioner's claim neither alleged nor sought damages, petitioner was not entitled to a jury trial.

More recently, the Second Circuit reconsidered the question whether a plaintiff shareholder in an action brought pursuant to section 36(b) was entitled to a jury trial. In that case, *Schuyt v. Rowe Price Prime Reserve Fund, Inc.,* 835 F.2d 45 (2d Cir. 1987), the court of appeals affirmed the striking of the jury demand after finding that the plaintiff's claim for repayment of excessive advisory fees was similar to the equitable disgorgement and accounting sought in *Gartenberg*.

Whatever a "bona fide claim for damages" may be in this statutory context, *Schuyt* is dispositive of the instant case. In the case at bar, plaintiffs argue that their complaint seeking "damages" preserves their right to a jury trial. Similarly, the *Schuyt* plaintiff contended that her claims seeking "legal damages" entitled her to a jury trial. *Id.* at 46. In both cases the relief sought is the same – the return of monies that had been wrongly paid out by the fund. The *Schuyt* court observed, as is equally appropriate here, that "[t]he mere fact that Schuyt has designated the relief she seeks as 'damages' does not mean that she is automatically entitled to a jury trial." *Id.* Quoting Judge Friendly, the court noted that, regardless of the label used, " '[w]hen restitution is sought in the

form and in the situations allowed in equity prior to the [Federal] Rules or authorized by valid statute there is no right to a jury trial.' " *Id.* (quoting *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95 (2d Cir. 1978)).[1]

Defendants' motion to strike plaintiffs' demand for a jury trial is granted.

It is SO ORDERED.

Dated: New York, New York
February 29, 1988

/s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
U.S.D.J.

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[1] Authority from the First Circuit is in accord. In *In re Evangelist*, 760 F.2d 27, 31 (1st Cir. 1985). The First Circuit denied a petition to compel a jury trial where the complaint under section 36(b) sought exactly the same relief as in the instant case. The court found that a complaint seeking to require an investment adviser "to pay to the Trust its damages" was indistinguishable from that in *Gartenberg*, where plaintiff sought to require the adviser "to account to the trust for its excessive fees." In the present action, plaintiff seeks to cause defendants "to pay to the Fund its damages." Obviously, the cases cannot be meaningfully distinguished.

Statutes Involved

Section 36(b) of the Investment Company Act of 1940, as amended; 15 U.S.C. § 80a-35(b):

> (b) For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person. With respect to any such action the following provisions shall apply:
>
> (1) It shall not be necessary to allege or prove that any defendant engaged in personal misconduct, and the plaintiff shall have the burden of proving a breach of fiduciary duty.
>
> (2) In any such action approval by the board of directors of such investment company of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, and ratification or approval of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, by the shareholders of such investment company, shall be

given such consideration by the court as is deemed appropriate under all the circumstances.

(3) No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payments received from such investment company, or the security holders thereof, by such recipient.

(4) This subsection shall not apply to compensation or payments made in connection with transactions subject to section 80a-17 of this title, or rules, regulations, or orders thereunder, or to sales loans for the acquisition of any security issued by a registered investment company.

(5) Any action pursuant to this subsection may be brought only in an appropriate district court of the United States.

(6) No finding by a court with respect to a breach of fiduciary duty under this subsection shall be made a basis (A) for a finding of a violation of this subchapter for the purposes of sections 80a-9 and 80a-48 of this title, section 780 of this title, or section 80b-3 of this title, or (B) for an injunction to prohibit any person from serving in any of the capacities enumerated in subsection (a) of this section.

Section 44 of the Investment Company Act of 1940, as amended; 15 U.S.C. § 80a-43:

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. A criminal proceeding based upon a violation of section 34, or upon a failure to file a report or other document required to be filed under this title, may be brought in the district wherein the defendant is an inhabitant or maintains his principal office or place of business. Any suit, or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28, United States Code. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court. The Commission may intervene as a party in any action or suit to enforce any liability or duty created by, or to enjoin any noncompliance with, section 36(b) of this title at any stage of such action or suit prior to final judgment therein.
